FILED

(2) 02-1146 NOV 25 2002

OFFICE OF THE CLERK

In the

# Supreme Court of the United States

October Term, 2002

---

CARL L. JAMES; RANDY DERRYBERRY; RALPH SACCAMANNO; BRUCE GATES; ALLEN BOWER; R. L. GARRISON; UNION PACIFIC RAILROAD COMPANY GENERAL COMMITTEE OF ADJUSTMENT; ET AL.,

v. *Petitioners*,

INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED LABOR ORGANIZATION,

*Respondent.*

---

*On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit*

---

## SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

---

Diane MacArthur Brown*
John R. Olsen
Olsen & Brown, L.L.C.
8362 Greenwood Drive
Niwot, Colorado 80503
(303) 652-1133
*Counsel for Petitioners*
**Counsel of Record*

---

60 pp

# DECISIONS IN THE TRIAL COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-Z-683

CARL L. JAMES, RANDY DERRYBERRY, RALPH SACCOMANNO, BRUCE GATES, ALLEN BOWER, R.L. GARRISON, UNION PACIFIC RAILROAD COMPANY GENERAL COMMITTEE OF ADJUSTMENT, and JOHN DOES 1 THROUGH 286 WHOSE IDENTITIES ARE CURRENTLY UNKNOWN,

Plaintiff(s),

v.

INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, an unincorporated labor organization,

Defendant(s).

RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

**Patricia A. Coan, United States Magistrate Judge**

The matter before the court is Defendant's Motion to Dismiss or in the Alternative for Summary Judgment [filed May 1, 2000] and Motion to Dismiss LMRDA Claim in First

Amended Complaint FN.1 or in the Alternative for Summary Judgment [filed March 15, 2001]. A Special Order of Reference under D.C.COLO.LR 72.1 referred this case to the undersigned magistrate judge on June 21, 2000 to issue a recommendation on defendant's motion. In a prior Recommendation addressing the jurisdictional issues raised in defendant's Motion to Dismiss, the court concluded that jurisdiction existed over the following claims asserted by plaintiffs: breach of the duty of fair representation under the Railway Labor Act ("RLA"), § 45 U.S.C. §§151, *et. seq.;* for a declaration of their rights under the IBLE Constitution and Bylaws, pursuant to 28 U.S.C. §§2201; and common law breach of contract and promissory estoppel claims. *See* October 20, 2000 Recommendation, adopted by the District Judge on February 16, 2001. Defendant now moves for summary judgment on the merits of those claims and also moves to dismiss plaintiffs' claims under the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§411-412. The motions were fully briefed as of April 12, 2001 and the court has determined that oral argument would not materially assist the Recommendation.

FN.1 The allegations of the First and Second Amended Complaints are the same, except that the second amended complaint reflects the dismissal of David Geisler as a named plaintiff. The court thus applies the arguments raised in defendant's Motion to Dismiss LMRDA Claim in First Amended

Complaint to the allegations of the Second Amended Complaint.

I.

Plaintiffs challenge an internal reorganization of the defendant International Brotherhood of Locomotive Engineers ("IBLE" or "International") following a merger between the Union Pacific Railroad Company ("UP"), the Southern Pacific Transportation Company, and the Denver & Rio Grande Western Railroad ("D&RGWR"). The individual plaintiffs are members of the IBLE, the union that represents the craft of locomotive engineers, assistant engineers, apprentice engineers, firemen, hostlers, and hostler- helpers employed by UP, and formerly employed by the D&RGWR prior to the merger. (Second Amended Compl., ¶¶4, 8-9) Plaintiff Union Pacific Railroad Company General Committee of Adjustment ("UP General Committee"), formerly known as the D&RGWR General Committee of Adjustment, was the IBLE general committee of adjustment designated by the IBLE to represent employees of the D&RGWR in collective bargaining matters prior to the merger. *(Id.* at ¶¶4, 14) Plaintiff James was the chairman of the UP General Committee. *(Id.* at ¶10)

Upon completion of the merger, defendant IBLE president C.V. Monin unilaterally declared that the plaintiff UP General Committee no longer existed as the collective bargaining representative for its members, including the individual plaintiffs

in this action. *(Id.* at ¶¶12-15) Plaintiff James appealed Monin's action to the BLE Board of Appeals and prevailed. *(Id.* at ¶¶21-27) Monin was subsequently recalled from office by vote of the BLE membership and was replaced by Dubroski. *(Id.* at ¶¶33)

On December 28, 1999, IBLE president Dubroski advised the IBLE General Chairmen he was recommending a merger of the eleven existing General Committees of Adjustment ("General Committees") and that the matter would be presented to the general membership for ratification. *(Id.* at ¶¶36) A majority of the general membership approved the recommended merger which eliminated the plaintiff UP General Committee as an independent General Committee. *(Id.* at ¶¶42, 47, 52) Plaintiffs assert that the elimination of the UP General Committee by general vote was in derogation of the IBLE Constitution and Bylaws which empowers the members represented by an affected General Committee to determine whether their Committee will be merged with any other General Committee(s). *(Id.* at ¶¶37-38, 41) Plaintiff James attempted to appeal the procedure by which the General Committees were merged, but IBLE President Dubroski refused to accept or process James' appeal. *(Id.* at ¶¶44-45)

The individual plaintiffs assert that they have been denied their IBLE constitutional right to General Committee representation of their choice and that the merger of the General Committees

was in retaliation for plaintiff James' past actions in challenging the International. *(Id.* at ¶¶47-51)

II.

Defendant moves for summary judgment on all of plaintiffs' claims. The purpose of summary judgment is to determine whether trial is necessary. *White v. York Int'l. Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary judgment is appropriate under Fed.R.Civ.P. 56(c) when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The movant bears the initial burden to "point to those portions of the record that demonstrate an absence of a genuine issue of material fact given the relevant substantive law." *Thomas v. Wichita Coca-Cola Bottling* Co., 968 F.2d 1022, 1024 (10th Cir. 1992). If this burden is met, the nonmovant must "come forward with specific facts showing that there is a genuine issue for trial as to elements essential to [the nonmovant's claim]." *Martin v. Nannie and the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993)(internal citations omitted). The nonmovant has the burden to show that there are genuine issues of material fact to be determined. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The court views the evidence of record and draws all reasonable inferences in the light most favorable to the nonmovant. *Thomas v. International Business Machines,* 48 F.3d 478, 484

(10th Cir. 1995). To defeat a properly supported motion for summary judgment, "there must be evidence upon which the jury could reasonably find for the plaintiff." *Panis v. Mission Hills Bank, N.A.*, 60 F.3d 1486, 1490 (10th Cir. 1995)(quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Conclusory allegations will not create a genuine issue of material fact necessitating trial. *White*, 45 F.3d at 363.

III.

A. Duty of Fair Representation, Breach of Contract and Promissory Estoppel

1. Duty of fair representation claim

Plaintiffs claim that defendant IBLE breached the duty of fair representation owed to the individual plaintiffs by divesting their General Committee representative of its authority in violation of the IBLE Constitution and Bylaws.

The Supreme Court has recognized an implied statutory duty of fair representation under the RLA. *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202-207 (1944). A breach of the duty of fair representation occurs when a union's conduct toward a member or group of members of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 75-76 (1991); *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele*, 323 U.S. at 202-207; *Rucker v. St. Louis Southwestern Ry. Co.*, 917 F.2d 1233, 1238 (10th Cir. 1990). The

duty of fair representation applies to union conduct arising from the union's role as bargaining unit representative, which includes the negotiation, administration and enforcement of collective bargaining agreements. *Int'l Brotherhood of Electrical Workers v. Foust,* 442 U.S. 42, 47 (1979); *Distler v. United Mine Workers of America,* 711 F.2d 76 (7th Cir. 1983); *Bass v. International Brotherhood of Boilermakers,* 630 F.2d 1058, 1062-63 (5th Cir. 1980); *Famulare v. United Transportation Union Int'l,* 639 F. Supp. 965, 967 (S.D.N.Y. 1986). The duty of fair representation is not implicated, however, by union conduct that affects an individual's relationship within the union structure. *See Bass,* 630 F.2d at 1063; *Distler v. United Mine Workers of America,* 711 F.2d 76, 79 (7th Cir. 1983).

It is questionable whether the conduct challenged here - the IBLE's reorganization of the General Committees - implicates the duty of fair representation. The court will assume, however, that the duty applies under the facts presented because the individual plaintiffs are claiming that the elimination of the plaintiff UP General Committee deprived them of their chosen bargaining agent to represent them in dealings with the carrier. FN.2 *See* Sections 1, 2 and 37(a) - Standing Rules (Plaintiffs' Exs. 10 and 11, p. 4; Def.'s Reply, Declaration of Dennis Simmerman, and Ex. A)

FN.2 The IBLE is composed of individually-chartered groups of members

> known as local divisions and a headquarters group, located in Cleveland, Ohio, known as the International Division. IBLE Constitution, Section 1.(a) (Pl.'s Ex. 10). The General Committees are the collective bargaining representatives for their members and are composed of persons elected by the local divisions. Sections 1, 2 and 37(a) - Standing Rules.

The following material facts are undisputed. In May 1999, when the IBLE and the carrier were close to completing negotiations on the merger implementing agreements, FN.3 then vice-president Dubroski requested that all UP general chairmen submit written recommendations addressing the necessity of merging the General Committees to meet the representational needs of the IBLE members on the merged railroad system. (Declaration of Edward Dubroski, ¶¶3-4, attached to Def.'s Motion for Summary Judgment ("MSJ")) The general chairmen were unable to agree on a recommendation. *(Id.* at ¶¶4-5) On December 28, 1999, Dubroski, who had by then had been elected President, advised the general chairmen that he recommended merging the eleven existing General Committees into six General Committees. *(Id.* at ¶¶1, 5; Plaintiffs' Ex. 101) The recommended reconstitution of the General Committees, which affected all IBLE members, was put to a vote of the general membership through a system-wide general ballot in January 2000. (Plaintiffs' Exs. 101 -103; Def.'s Reply, Supplemental Declaration of Dennis Simmerman, ¶¶2, 5-6) The recommendation was approved by a majority of all

union members who voted and the merger of the General Committees was thereafter effected. (Supplemental Simmerman Declaration, ¶¶5-6; Plaintiffs' Exs. 106 -108) The majority of the members of the plaintiff UP General Committee who voted opposed the merger. *(Id.)*

Plaintiff Carl James attempted to appeal the procedure by which the merger was accomplished, but IBLE President Dubroski denied his appeal under Section 44(a)(1) - Constitution. (James Declaration, ¶¶, 2-8, Plaintiffs' Ex. 119; Def.'s MSJ, Dubroski Declaration, ¶7)

> FN.3 In conjunction with the railroad merger, the IBLE General Chairmen, including plaintiff James, negotiated merger implementing agreements with the carrier. (Def.'s MSJ, Simmerman Declaration, ¶¶5-6, 9). Pursuant to the merger implementing agreements, the carrier selected the Union Pacific Eastern District and the Northern Idaho District collective bargaining agreements to govern the employment relationship between the carrier and IBLE members, including the individual plaintiffs. *(Id.* at ¶8) The collective bargaining agreement which had formerly governed the individual plaintiffs' employment relationship with the DRGWR was abrogated by the railroad merger.

Pursuant to the merger of the General Committees, the five local divisions formerly represented by the UP Committee were placed under the jurisdiction of the UP - Eastern District

and UP -Western District General Committees. (Def.'s Reply, Declaration of T.J. Donnigan, ¶4) Since the realignment, the UP - Eastern District and UP-Western District General Committees have represented, and will continue to represent, former D&RGW General Committee members in disputes with the carrier. *(Id.* at ¶¶5-6; and Declaration of Mark F. Chenchar, ¶¶4-5)

The parties agree that the IBLE President has the authority to recommend a merger of General Committees following a railroad merger under Section 33(a)(1)B - Standing Rules of the IBLE, Constitution and Bylaws, and that such a merger cannot be implemented absent ratification by a majority of the affected union members. The parties' dispute is over the balloting procedure used in obtaining ratification of the merger, and the President's interpretation of the word "decision of the majority" as used in Section 33(a)(1)B which states:

> [In the event of a railroad merger], the committees involved on the merged systems may be consolidated, if necessary, to meet the representational requirements of the membership.
>
> The officer assigned shall submit his recommendations to the International President. If the recommendation is to merge the involved committees, the International President shall forward said recommendation with all facts in support to the involved general committees. The

> affected general committee(s) shall refer the question to the membership under their jurisdiction by instructing each affected division to prepare a paper ballot to be delivered within sixty (60) days to each member of the division . . . The ballot and return envelope must also be accompanied with the written recommendation of the International President, [and] the written recommendation of the affected general chairmen . . .[After the ballots are counted by each division], **[i]f the decision of the majority is to merge the committees in question**, the International President shall notify the affected general committees of the decision and instruct the merged committees to meet within ninety (90) days for the purpose of electing new officers, . . . and conducting any business or grievance that may properly come before the body. . . **If it is the decision of the majority not to merge their GCA's, their individual GCA's shall continue as heretofore.**

(Plaintiffs' Ex. 10)(Emphasis supplied.)

The individual plaintiffs maintain that the IBLE breached its duty to fairly represent them by disregarding the language of Section 33(a)(1)(B) - Standing Rules which allows a General Committee to determine its own fate in the face of a proposed merger of General Committees. Instead, the IBLE effected the merger based on the majority vote of the voting members of all affected General Committees. Plaintiffs argue that under Section

33(a)(1)B, if the majority of members represented by a single General Committee vote not to merge their Committee with another one, the merger cannot be effected as to that General Committee.

Absent bad faith or a patently unreasonable interpretation, the courts should defer to the judgment of union officials concerning the proper interpretation of a union's constitution and bylaws. *See Local No. 48 v. United Broth. of Carpenters & Joiners,* 920 F.2d 1047, 1052 (1st Cir. 1990); *Sim v. New York Mailers' Union No. 6,* 166 F.3d 465, 469- 470 (2d Cir. 1999); *Local* 334 *v. United Ass'n of Journeymen,* 669 F.2d 129, 131 (3rd Cir. 1982); *Newell v. Int'l Broth. of Elect. Workers,* 789 F.2d 1186, 1189 (5th Cir. 1986); *Fulk v. United Transp. Union,* 160 F.3d 405, 407-08 (7th Cir. 1998)(internal citations omitted); *Allen v. United Transp. Union,* 964 F.2d 818,821 (8th Cir. 1992); *Motion Picture & Videotape Editors Guild, Local 776 v. Local 695*, 800 F.2d 973, 975 (9th Cir. 1986).

To survive summary judgment on their breach of the duty of fair representation claim, plaintiffs must provide probative evidence that the IBLE's conduct was arbitrary, discriminatory, or in bad faith. *O'Neill,* 499 U.S. at 75-76. A union's actions are arbitrary "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Id.* at 67 (internal quotations omitted). Bad faith must be demonstrated by evidence that union

officials acted contrary to the IBLE's best interests, out of self-interest, or in an unconscionable or outrageous way. *Local No. 48*, 920 F.2d at 1055; *Local 1052 v. Los Angeles Cnty. Dist. Council of Carpenters,* 944 F.2d 610, 615 (9th Cir. 1991).

a. Interpretation of "decision of the majority"

Defendant argues that President Dubroski's interpretation of Section 33(a)(1)B - Standing Rules was reasonable because the provision uses the plural, rather than the singular, when referring to "their GCA's" (General Committees of Adjustment). Defendant emphasizes that a few years prior to the merger of the General Committees, plaintiff James interpreted Section 33(a)(1)B in the same manner as President Dubroski. In June 1997, James advised other union members that if the proposed merger was put to a general vote, the UP General Committee would be eliminated because the votes of the larger General Committees would outnumber the votes of the smaller UP General Committee. (Def.'s Reply, Ex. C, June 3, 1997 letter from James to all local chairmen) FN.4 In December 1997, to avoid the anticipated elimination of the UP General Committee, Division 29 of the UP General Committee prepared and circulated an initiative to submit to a general membership vote a proposed amendment to Section 33(a)(1)B to clarify that the decision to consolidate a particular General Committee must be approved by a majority of the membership of that General

Committee. *(See* Def.'s Reply, Ex. A) Defendant represents that the initiative was never voted on by the general membership. Defendant maintains that plaintiff James' prior interpretation of Section 33(a)(1)B -Standing Rules, which is consistent with the IBLE's interpretation, demonstrates that IBLE president Dubroski's interpretation was reasonable.

> FN.4 In his June 3, 1997 letter, James states: "[I]f [the proposed consolidation of General Committees] should be referred to the membership for a vote, then all members of all Committees involved would vote. Needless to say, we would not have a chance as we are totally out numbered by the UP Committees in both the Denver and Salt Lake City. ..Simply put, General Custer had a better chance at the Little Big Horn, than we will have to keep our right to represent our members if this goes to a one man one vote process." (Def.'s Reply, Ex. C) .

Plaintiffs argue that the International's interpretation of Section 33(a)(1)B - Standing Rules is unreasonable as demonstrated by the "legislative history" of that provision and of Section 4 - Standing Rules. Plaintiffs submit evidence that Sections 4(c) and 33(a)(1)B (then Section 34) - Standing Rules were amended at the 1991 Fifth Quinquennial Convention to preclude the International President from mandating a merger of General Committees without ratification by the affected membership.

FN.5 (Plaintiffs' Exs. 27, 118) Plaintiffs argue that the intent of both amendments was to empower the members of an affected General Committee to determine their own fate in the face of a proposed merger of General Committees and to allow a General Committee to remain independent if the members of that Committee so desired.

> FN.5 Prior to the 1991 amendments, Sections 4(c) and 34(a)(1)B gave the IBLE president the authority to mandate a consolidation of General Committees without ratification by the union membership. (Pl.'s Ex. 13; Def.'s Reply, Ex. X) The record reflects that the IBLE president forced some mergers of General Committees in the decade prior to the 1991 Fifth Quinquennial Convention. *(See, generally,* Plaintiffs' Exs. 29-88)

Section 4(c) - Standing Rules, a provision not at issue here, was amended at the 1991 Convention to state:

> [I]n the event the International President has reason to believe that the merging of [a G.C. of A. on any small road or system] would be in the best interest of the members, he shall forward the request with all facts in support of his position to the affected General Committees, requesting they voluntarily agree to the merger. The final decision will rest with the affected

> members of the involved Committees, as per Section 4(a) above.

(Def.'s Reply, Ex, X) Section 4(a) provides that if a General Committee appeals a membership vote in favor of a voluntary merger, the members on the portion of the system from which the appeal is made will vote again on the merger, and if the majority of those persons vote against the merger, "their individual G.C. of A. shall continue as heretofore." *(Id.)*

Plaintiffs, relying on the 1991 Amendment to Section 4, contend that the transcript of the proceedings of the 1991 Fifth Quinquennial Convention contain comments by two union members which support the plaintiffs' interpretation of Section 33(a)(1)B (then Section 34). In response to the resolution to amend Section 34(a)(1)B, one member stated that "[i]f the members of the general committee want to remain separate, it shouldn't be forced on them by the International." (Pl.'s Ex. 118, p. 331) Another member commented: "[T]his is similar to the change that we've already made in the Standing Rule Section 4(c)." FN.6 *(Id.* at p. 332)

> FN.6 Plaintiffs rely on other member comments, as well, *see* comments referenced at pp. 17-18 of Plaintiffs' Resp. Brief; however, those comments do not express an intent that each General Committee be allowed to determine whether it will be merged with another

> General Committee, but instead reflect a general desire to abolish the authority of the president to force a merger without a membership vote. (Plaintiffs' Ex. 27)

Plaintiffs' reliance on Section 4(c) is misplaced for two reasons. First, that section does not apply to a recommended merger of General Committees following a railroad merger. Section 33(c) -Standing Rule expressly states that when the merger of General Committees is proposed in conjunction with a railroad merger, Section 33(a)(1)B governs over any conflicting section of the Constitution and Bylaws. Second, the language of Section 4 tends to support the defendant's interpretation of Section 33(a)(1 )B, rather than the plaintiffs' interpretation. The use of the singular when referring to "their individual G.C. of A." in Section 4(a), and the use of the plural when referring to "their GCA's" in Section 33(a)(1 )B, reflects that the draftsmen were careful to differentiate between the majority of voting members on a single General Committee and the majority of voting members on all affected General Committees.

Plaintiffs do not dispute that Section 7(b) of the Constitution grants the IBLE president the authority to interpret and apply the "law of the BLE." (Dubroski Declaration, ¶2, and Ex. H, attached to Def.'s MSJ) It is a reasonable interpretation of Section 33(a)(1)B that the majority of all members voting on a proposed

merger will decide the issue and that a contrary vote by the majority membership of one of the affected General Committees will not preclude the merger. Further, the language of Section 4 which refers to "their individual G.C.of A." supports the defendant's interpretation that the reference to "their individual GCA's" in Section 33(a)(1)B was intended to be to the majority vote of the members of all affected General Committees, rather than the majority vote of a single General Committee. The court finds that the IBLE's interpretation of the phrase "decision of the majority" was not patently unreasonable or arbitrary. *See Fulk,* 160 F.3d at 409 ("It is unnecessary to resolve which of the two meanings of 'majority' is the better one. We ask only whether the Union's interpretation is reasonable."). Plaintiffs' evidence that some members attending the 1991 Fifth Quinquennial Convention interpreted the language as urged by the plaintiffs is insufficient to create a genuine issue of material fact about the reasonableness of the IBLE's interpretation of Section 33(a)(1)B. FN.7

FN.7 Plaintiffs further argue that a BLE Board of Appeals' decision issued January 20, 2000 supports their position that a merger of General Committees can only be affected through a majority vote of the affected members of a particular General Committee. The Board of Appeals decision was based on events occurring prior to President Dubroski's proposal to merge the General Committees. The BLE Board of

Appeals sustained plaintiff Carl James' appeal of former IBLE President Monin's refusal to recognize James' authority to interpret the governing collective bargaining agreement and to represent the members whom he represented prior to the Railroad merger. (Plaintiffs' Exs. 11 and 12) The BLE Board of Appeals concluded that President Monin had undermined the ability of James to fulfill his duties and obligations as a general chairman, as contemplated by the BLE Constitution and Bylaws. *(Id.* at Ex. 12) The Board of Appeals' decision further stated that before a merger of General Committees can occur in conjunction with a railroad merger, each member affected must be allowed to vote on the recommended merger, in accordance with Section 33(a)(1)B -Standing Rules. *(Id.)* Nothing in the Board of Appeals' decision supports plaintiffs' position that Section 33(a)(1)B authorizes a single General Committee to remain independent if the majority of the members of that General Committee vote against a merger. Accordingly, the Board of Appeals' decision does not demonstrate that the IBLE's interpretation of Section 33(a)(1)B was patently unreasonable.

Because the court has concluded that the IBLE's interpretation was not arbitrary, plaintiffs must demonstrate, through probative evidence, that the IBLE's actions were either discriminatory or in bad faith to survive summary judgment on

their duty of fair representation claim. Plaintiffs do not allege any discrimination.

Plaintiffs argue that President Dubroski's decision to merge the General Committees was in bad faith and was motivated by a desire to "put [plaintiff Carl James and his General Committee] out of business" because James was a "thorn in the side of the International BLE when it came to its actions in derogation of the Constitution and Bylaws and other abusive acts by the International officials in Cleveland." (Plaintiffs' Resp., p. 20) Plaintiffs emphasize that James had chaired the 1991 committee to change the Constitution and to enforce it. (James Declaration, Plaintiffs' Ex. 4, at ¶8) James also participated in the recall of former president Monin from office. *(Id.* at ¶9)

Plaintiffs have not proffered any evidence to show that IBLE President Dubroski, Monin's successor, acted against the union membership's best interest or out of self- interest. Defendant's stated reason for the merger of the then-existing eleven General Committees was to strengthen the representation of the IBLE membership following the railroad merger and to minimize member dues. *(See* Def.'s Reply, Simmerman Declaration, ¶12 and Dubroski Declaration, ¶5; PI.'s Ex. 101) Plaintiffs have not submitted any evidence to show that the IBLE's stated reasons for the merger of the General Committee were invalid. Additionally, James could have run for office in one of the newly-created six General Committees, but he chose not to do so. (Supplemental Simmerman Declaration, ¶¶9-12) Further, although there may

have been some animosity between James and former IBLE president Monin over Monin's attempt to merge General Committees without a membership vote, it was Dubroski, not Monin who recommended the merger at issue here. There is no evidence that Dubroski unfairly targeted plaintiffs Carl James and the UP General Committee in proposing a merger which would affect all union members, not just the members of the UP General Committee. Finally, there is no evidence that Dubroski acted in an outrageous or unconscionable manner. The court concludes that no reasonable jury could find, on the evidence presented, that Dubroski's interpretation and application of Section 33(a)(1)B was in bad faith.

The court recommends that defendant's motion for summary judgment be granted on plaintiffs' claim that defendant breached the duty of fair representation in its interpretation of "decision of the majority" as used in Section 33(a)(1)B -Standing Rules.

b. Voting procedure did not comply with Section 33(a)(1)B

Plaintiffs also claim that the voting procedure violated Section 33(a)(1)B - Standing Rules because the ballot was prepared by the International and submitted to the members by the International, and only the International's recommendation accompanied the ballot. Section 33(a)(1) provides that in the event of a railroad merger, the International president shall assign an

officer to direct the General Committees "in the handling to the best interests of the members involved." (Plaintiffs' Ex. 10) After the International president receives a recommendation to merge General Committees from the assigned officer, Section 33(a)(1)B directs the president to submit the merger recommendation to the affected General Committees and provides that the General Committees shall thereafter refer the question to the membership under their jurisdiction through a ballot prepared by each division within the General Committee. The ballot prepared by a division must be accompanied by the written recommendations of both the International President and affected general chairmen.

The record reflects that the stated reason given by the International in response to member inquiries as to why the General Committees did not put out the ballet themselves was that because the International president was the one making the recommendation for a merger of the General Committees, he interpreted Section 33(a)(1)B to require that only his recommendation would go out with the ballots, and that the ballots would be sent to the members by the International Office, and returned to the International Office, to maintain neutrality. (Plaintiffs' Ex. 102, January 7, 2000 Letter from Simmerman to Dubroski) The International also advised inquiring members that "if a general chairman wants to put out his letter of recommendation or non-recommendation to his membership, he has the right to do so." (Plaintiffs' Ex. 102)

Plaintiffs argue that the balloting procedure used by the International president was contrary to the plain language of Section 33(a)(1)B - Standing Rule and was therefore unreasonable. Plaintiffs further maintain that Dubroski's disregard of the procedural requirements was politically motivated by his desire to prevent general chairmen like plaintiff James from providing position papers to their General Committee members before the vote. Plaintiff James states that the wrongful merger of the General Committees has harmed the plaintiffs by denying them representation by their elected general chairman and forcing them to become members of a different General Committee represented by a general chairman they did not elect. (James Declaration, Plaintiffs' Ex. 119, ¶12)

Defendant contends that even if the voting procedure did not strictly comply with the requirements of Section 33(a)(1)B-Standing Rules, the individual plaintiffs have not suffered any harm as a result. Defendant emphasize that plaintiffs' claims and grievances continue to be processed by the newly-organized General Committees and it is less expensive to operate six rather than eleven General Committees. Further, James was eligible to run for office on one of the new General Committees, but he chose not to do so.

The court is mindful of the long-standing policy against interference by the judiciary in the internal affairs of labor organizations, particularly when the union's governing documents bestow

substantial discretion on the president to interpret those documents. *See Local 34 v. Northern California Carpenters Regional Council,* 992 F.Supp. 1138, 1142 (N.D.Cal. 1997), *aff'd* 139 F.3d 905 (9th Cir. 1998)(collecting cases). The court finds that a reasonable jury could not conclude that in light of the factual and legal landscape at the time of the IBLE president's actions, the IBLE's behavior in submitting the ballots to the members directly, without a position statement by the members' General Chairmen, was so far outside a 'wide range of reasonableness' as to be irrational. *O'Neill,* 499 U.S. at 67.

Plaintiffs do not dispute IBLE president Dubroski's statements that the merger recommendation was made after the General Chairmen were unable to reach an agreement on the best way to merge the existing General Committees in order to meet the representational needs of the members on the merged railroad system. *(See* Def.'s MSJ, Dubroski Declaration, ¶¶3-5) Plaintiffs have pointed to no language in the IBLE Constitution and Bylaws which prohibits the IBLE president from taking the initiative to recommend a merger of General Committees and it was not irrational for the IBLE president to submit the ballots directly to the members. There is no dispute over the accuracy of the International's tabulation of the votes. Further, there is no evidence that the General Chairmen were prohibited from submitting position statements to their General Committee members on their own initiative. FN.8 Finally, the record is devoid of any evidence of discrimination or bad

faith on the part of president Dubroski, as discussed in Section III.A.1.a, *supra.*

> FN.8 The court notes that plaintiffs have not submitted affidavits to show that any union members who voted in favor of the recommended merger would have voted against the merger if the ballots had been sent to them by their general chairmen, along with a position statement. Similarly, there is no evidence in the record that the merger of the General Committees has interfered with the plaintiff members' employment relationship with the carrier.

The court recommends that summary judgment be granted in favor of defendant on plaintiffs' claim that defendant breached the duty of fair representation by failing to strictly comply with the balloting procedure set forth in Section 33(a)(1)B -Standing Rules.

c. Refusal of James' appeal

Plaintiffs also take issue with International President Dubroski's actions in refusing to accept or process plaintiff James' January 28, 2000 appeal of Dubroski's decision to merge the General Committees and to submit the matter to the general membership for ratification. (*See* James Declaration, Plaintiffs' Ex. 119, at ¶¶4-6, and Exs. 109, 116) Plaintiffs argue that James' appeal was proper under Section 44 - Constitution, or under a separate appeal procedure fashioned by Dubroski,

as set forth in his December 28, 1999 letter to all general chairmen. (Plaintiffs' Exs. 101, 105, 112)

Section 44(a)(1) -Constitution provides:

> A Board of Appeals shall be established which shall have authority to render a final and binding decision on all appeals from decisions or interpretations of the International President, decisions of the Executive Committee and/or the Advisory Board submitted in conformity with the provisions for such appeals hereinafter set forth, except as provided in Section 7- Constitution, Section 8(g) - Statutes, and Subsections A, B, C, and D of Section 33(a)(1) -Standing Rules.

(Def.'s Reply, Supplemental Simmerman Declaration, ¶4)

President Dubroski's interpretation of Section 44(a)(1) is not contrary to the plain language of that provision which states that the International President's interpretation of, or decision arising under, Section 33(a)(1)B is not appealable. The record reflects that the past practice of IBLE presidents has been to interpret Section 44(a)(1) in the same manner as Dubroski. (*See* Def.'s MSJ, Ex. K to Dubroski Declaration) The court thus finds that a reasonable fact-finder could not conclude that President Dubroski's interpretation of Section 44(a)(1) was patently unreasonable or arbitrary. Plaintiffs have also

failed to provide any evidence that president Dubroski's actions were discriminatory or in bad faith, as discussed in Section III.A.1.a, *supra*..

Further, plaintiff James has not demonstrated an appeal right pursuant to Section D of Dubroski's December 28, 1999 letter to all general chairmen because that letter did not purport to set forth a procedure by which members could appeal the recommended consolidation of the General Committees. Instead, the letter created a dispute resolution procedure for disputes between a former General Committee and a newly-created General Committee, or between two newly-created General Committees, over jurisdiction, financial and housekeeping issues arising as a result of the final restructuring of the General Committees.

In sum, the court finds that the individual plaintiffs have failed to demonstrate the existence of genuine issues of material fact on their claim that defendant IBLE breached the duty of fair representation by denying them their chosen collective bargaining representative in violation of the provisions of the IBLE Constitution and Bylaws. Defendant's motion for summary judgment should be granted on the duty of fair representation claim.

2. Breach of contract and promissory estoppel claims

Plaintiffs claim that the defendant breached the terms of Sections 33(a)(1)B - Standing Rules

and Section 44(a)(1) - Constitution in refusing to allow the UP General Committee to remain independent after the majority of the Committee's members voted against the proposed merger and in refusing to allow James to appeal President Dubroski's implementation of his merger recommendation. FN.9 Plaintiffs also claim that the IBLE breached an earlier material promise by then-IBLE president Monin, that there would be no post-merger action to modify existing representation of the General Committees without the consent of the membership of the General Committees. (Second Amended Complaint, ¶20)

> FN.9 A union Constitution is an enforceable contract between the members and the International union. *See United Ass'n of Journeymen v. Local 334*, 452 U.S. 615 (1981); *Local Union No. 575 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting In dust. v. Local Union No. 575 of United Ass'n of Journeymen and Apprentices of Plumbing and Pipefitting Indus. of United States and Canada,* 995 F.Supp. 1151, 1155 (D. Colo. 1998)(Babcock, J.)

Plaintiffs' state law claims are premised on the same union conduct as the duty of fair representation claim and are therefore preempted by the federal claim. *See Condon v. Local 2944, United Steelworkers of America, AFl-CIO,* 683 F.2d 590, 594-95 (1st Cir. 1982); *Nellis V. Airline*

*Pilots Assoc.*, 805 F.Supp. 355, 360-61 (E.D.Va. 1992), *affd* 15 F.3d 50 (4th Cir. 1994); *Sheehan v. U.S. Postal Service*, 6 F.Supp.2d 141. 150-51 (N.D.N.Y. 1997); *Oliva v. Wine, Liquor and Distillary Workers Union, Local One*, 651 F.Supp. 369, 371 (S.D.N.Y. 1987).

Even if the state claims are not preempted, the court's determination of plaintiffs' duty of fair representation claim is dispositive of the state law breach of contract claim. The court defers to the IBLE's reasonable interpretation of the Constitution and Bylaws. *Local No. 48*, 920 F.2d at 1052; *Sim*, 166 F.3d at 469-470; *Local* 334, 669 F.2d at 131; *Newell*, 789 F.2d at 1189; *Fulk*, 160 F.3d at 407-08; *Allen*, 964 F.2d at 821 ; *Motion Picture & Videotape Editors Guild, Local 776*, 800 F.2d at 975. As stated previously, the IBLE Constitution grants the IBLE president the authority to interpret the Constitution and Bylaws. Because President Dubroski's interpretation of Section 33(a)(1)B - Standing Rules and Section 44(a)(1) - Constitution was not unreasonable, the court will not interfere in the internal affairs of the IBLE. Summary judgment should be granted in defendant's favor on plaintiffs' breach of contract claim. Further, the promissory estoppel claim is precluded under Colorado law because plaintiffs have a contractual remedy. *See Vigoda v. Denver Urban Renewal Authority*, 646 P.2d 900 (Colo. 1982)(stating the remedy of promissory estoppel is not available where there is an enforceable contract); *Bellairs v. Coors Brewing Co.*, 907 F.Supp. 1448, 1455 (D. Colo. 1995), *aff'd on other grounds*, 107 F.3d 880 (10th Cir. 1997).

The court recommends that plaintiffs' state law claims of breach of contract and promissory estoppel be dismissed.

B. LMRDA claim

Plaintiffs assert that the procedure used by the International to consolidate the General Committees violated their rights under the LMRDA because the consolidation was undertaken for the purpose of suppressing dissent within the union and to destroy the representational authority of plaintiff James in retaliation for James' prior conduct in exercising his free speech rights to challenge the actions of the IBLE. (Second Amended Complaint, ¶51) Plaintiffs allege that the IBLE has denied plaintiffs their voting rights, due process rights and other democratic rights within the union, and has prevented plaintiffs from meeting together to discuss and conduct union business. *(Id.* at ¶¶51-52)

Section 102 of LMRDA confers jurisdiction in the federal district courts over claims by members of a labor organization for infringement of the rights guaranteed under Section 411. 29 U.S.C. §412. Section 102 does not confer jurisdiction unless Section 101 has been violated. *Calhoon* v. *Harvey,* 379 U.S. 134, 138 (1964). Section 101 guarantees all union members, *inter alia,* an equal right to vote and to participate in

union decisions, and the right to freedom of speech and assembly, subject to any reasonable rules and regulations set forth in the union's constitution and bylaws. 29 U.S.C. §411(a)(1) and (2); *Local No. 82 v. Crowley,* 467 U.S. 526, 536-37 (1984).

Defendant argues that the court lacks jurisdiction over the LMRDA claim because plaintiffs have failed to allege facts to show that they were discriminated against within the meaning of Section 101 (a). FN.10 Defendant maintains that an alleged breach of a union's constitution and bylaws, without discrimination, does not violates LMRDA.

> FN.10 Defendant's challenge to the court's jurisdiction over plaintiff's LMRDA claim is treated as a motion for summary judgment because resolution of the jurisdictional question is intertwined with the merits of the claim and the defendant relies on evidentiary materials in support of its position. *See Holt v. United States,* 46 F.3d 1000, 1003 (10th Cir. 1995).

A claimed infringement of the rights guaranteed by Sections 101 (a)(1) must be predicated on some form of discrimination. *See Calhoon,* 379 U.S. at 138-139 (Section 101 (a) "is no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote."); *Members for a Better Union v. Berona,* 152 F.3d 58, 65 (2d Cir. 1998)(stating that a §101(a)(1)

claim must "allege the denial of some privilege or right to vote which the union has granted to others."); *Local No. 243, United Transp. Union v. United Transp. Union,* 147 LRRM 2558, 2560 n.3 (N.D.Tex. 1994), *aff'd without published opinion,* 18 F.3d 937 (5th Cir. 1994)("[Section 101 (a)(1)] does not create rights, but rather assures that when a union grants rights to its members all will be treated equally.") When a union member challenges the union's interpretation and application of provisions of the union's constitution and bylaws, the pertinent inquiry is whether the provisions have been applied to discriminate against a union member. *Calhoon,* 379 U.S. at 138; *Smith v. United Mine Workers of America,* 493 F.2d 1241, 1244 (10th Cir. 1974); *Acri v. Int'l Ass'n of Machinists and Aerospace Workers,* 595 F.Supp. 326, 333 (D.C.Cal. 1983), *aff'd* 981 F.2d 1393 (9th Cir. 1986).

Plaintiffs respond that they have asserted the requisite discriminatory treatment based on their allegations that the IBLE's interpretation of Section 33(a)(1)B - Standing Rules to allow the majority of all members voting to decide whether the proposed merger of General Committees would be effected deprived them, as members of a small General Committee, of any meaningful right to vote. Plaintiffs assert that the International president's actions had an unlawful disparate impact on them by effectively removing the voting rights of a distinct minority within the union.

Plaintiffs' LMRDA claim is premised on the same factual allegations as their duty of fair

representation, breach of contract and promissory estoppel claims. Characterization of these allegations as a LMRDA violation does not negate the fact that plaintiffs are again attacking the IBLE president's interpretation and application of Section 33(a)(1)B - Standing Rules and Section 44 - Constitution. The court has already found, in Section III. A.1, *supra,* that the IBLE president's interpretation of those provisions of the IBLE Constitution and Bylaws was not patently unreasonable or in bad faith. Significantly, plaintiffs have not stated any additional facts to show that were treated differently than other union members with regard to their opportunity to vote on the recommended merger of General Committees. The individual plaintiffs' votes counted the same as every other member's vote. The majority vote determined whether the proposed merger of General Committees would be effected and that decision falls equally on all IBLE members. Further, plaintiffs were not treated differently than other union members in the right to appeal a merger of General Committees ratified by the membership under Section 33(a)(1)B - Standing Rules because Section 44(a)(1) - Constitution prohibits an appeal by anyone. Because plaintiffs have failed to allege that they were treated differently than other union members with regard to their right to vote on the recommended merger of the General Committees and the denial of any appeal of the ratification decision, plaintiffs have not stated a violation of Section 101 (a)(1) of LMRDA and the court thus lacks jurisdiction over that claim. FN.11

FN.11 Plaintiffs claim that the balloting procedure failed to comply with the requirements of Section 33(a)(1)B - Standing rules and therefore deprived them of their voting rights in violation of LMRDA is similarly without merit because all members were issued the same ballot and were bound by the result. *See Members for* a *Better Union,* 152 F.3d at 65-66; *Nienaber v. Ohio Valley Carpenters Dist. Council,* 652 F.2d 1284, 1286 (6th Cir. 1981).

Plaintiffs further claim that the IBLE violated Section 101 (a)(2) of LMRDA, which guarantees union members the "right to meet and assemble freely with other members" and to "express any views, arguments, or opinions," subject to reasonable rules and regulations imposed by the union. 29 U.S.C. §411 (a)(2). Section 101 (a)(2) was adopted to "promote union democracy" by ensuring that "union members are free to discuss union policies and criticize the leadership without fear of reprisal." *United Steelworkers of America v. Sadlowski,* 457 U.S. 102, 112 (1982).

Plaintiffs maintain that the IBLE engaged in "a scheme to suppress dissent" within the union by thwarting the plaintiffs' exercise of democratic rights guaranteed by the IBLE Constitution and Bylaws. Plaintiffs allege that the IBLE has acted with "the particular intent of destroying the representational authority of Plaintiff James, who

has successfully dissented with and challenged the actions of the International BLE in the past." (Second Amended Complaint, ¶51)

Defendant argues that plaintiffs have not proffered any evidence to support their assertion that IBLE president Dubroski vindictively targeted plaintiff James and his General Committee in recommending the merger of all existing General Committees. Defendant emphasizes that any illegal motive behind former IBLE president Monin's actions in unilaterally divesting plaintiff James and the UP General Committee of authority to represent the Committee members cannot be imputed to Monin's successor, president Dubroski, who complied with the IBLE Constitution and Bylaws in accomplishing a merger of the General Committees.

The Section 101 (a)(2) claim is premised on the same conduct which forms the bases for plaintiffs' duty of fair representation, breach of contract and promissory estoppel claims. To reiterate, the court has already found that IBLE president Dubroski's interpretation and application of Section 33(a)(1)B - Standing Rules and Section 44 - Constitution was not patently unreasonable or in bad faith. Under the merger plan, which was ratified by a majority of the union members, five General Chairman, including plaintiff Carl James, lost their offices. Plaintiffs were allowed to express their view on the recommended merger through their "nay" votes on the merger ballot. After the merger was effected, plaintiff James and the other plaintiffs were free to run for office in

one of the newly- created General Committees, but declined to do so. There is no evidentiary support in the record for plaintiffs' claim that president Dubroski's actions with regard to the merger of the General Committees was part of a "scheme to suppress dissent" within the union or was a retaliatory act against James for his past disputes with former president Monin. The court lacks jurisdiction over plaintiff's Section 101 (a)(2) claim because plaintiffs have failed to demonstrate an infringement of their free speech rights. FN.12

> FN.12 Similarly, to the extent plaintiffs argue that IBLE president Dubroski's actions in recommending the merger of the General Committees constituted unlawful disciplinary action under Section 101 (5) of LMRDA, plaintiffs have failed to submit evidence sufficient to create a reasonable inference that the IBLE president acted with a discriminatory motive, or, that plaintiffs' membership rights were not substantially protected after the merger of General Committees was accomplished. *See Local No. 48*, 920 F.2d at 1056; *Local 37 v. Sheet Metal Workers,* 655 F.2d 892, 897 (8th Cir. 1981); *Teamsters Joint Council No. 42 v. Int'l Broth. of Teamsters,* 82 F.3d 303, 306 (9th Cir. 1996). The summary judgment record reflects that plaintiffs have not suffered any infringement of their membership rights as a result of the change in General Committee representation. *(See* Chencar and Donnigan Declarations, attached to Def.'s Reply.)

The court recommends that plaintiffs' LMRDA claims be dismissed for lack of subject matter jurisdiction. FN.13

FN.13 The court need not address defendant's other jurisdictional argument, that the plaintiff UP General Committee lacks standing to pursue a LMRDA claim, because the UP General Committee's claim is premised on the same facts as the individual plaintiffs' claims.

IV.

For the reasons set forth above, it is

RECOMMENDED that Defendant's Motion for Summary Judgment [filed May 1, 2000] be GRANTED. It is

FURTHER RECOMMENDED that the Motion to Dismiss LMRDA Claim in [Second] Amended Complaint or in the Alternative for Summary Judgment [filed March 15, 2001] be GRANTED. It is

FURTHER RECOMMENDED that the Second Amended Complaint be DISMISSED WITH PREJUDICE.

**Within ten days after being served with a copy of the proposed findings and recommendation, any party may serve and file written objections to the proposed findings and recommendation with the Clerk of the United**

**States District Court for the District of Colorado. The district court judge shall make a de novo determination of those portions of the proposed findings or specified recommendation to which objection is made. The district court judge may accept, reject, or modify, in whole or in part, the proposed findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.**

**Failure to make timely objections to the magistrate judge's recommendation may result in a waiver of the right to appeal from a judgment of the district court based on the findings and recommendations of the magistrate judge.**

Dated this 18th day of April, 2001.

BY THE COURT:

PATRICIA A. COAN

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 00-Z-683
CARL L. JAMES, et al.,

Plaintiffs,

vs.

INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Defendant.

REPORTER'S TRANSCRIPT
(Hearing on Motion for Summary Judgment)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:20 a.m., on the 17th day of May, 2001, in Courtroom C-400, United States Courthouse, Denver, Colorado.

**APPEARANCES**

HAROLD A. ROSS, Attorney at Law, 1370 Ontario Street, Cleveland, Ohio, 44113-1702, and MICHAEL S. WOLLY, Attorney at Law, 1025 Connecticut Avenue, N.W., Suite 712,

Washington, D.C., 20036-5405, appearing for the defendant.

Proceeding Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado, 80294, (303) 629-9285

## PROCEEDINGS

(In open court at 9:20 a.m.)

*THE COURTROOM DEPUTY*: The matter now before the Court, Civil Action No. 00-Z-683, Carl L. James, et al., vs. International Brotherhood of Locomotive Engineers.

*THE COURT*: Good morning. It appears that Mr. Olsen is not here. He called the Court and said he had the impression that it was canceled. I don't know how he received that impression, because a notice was clearly sent out for a trial prep conference, at which time all pending motions could be heard.

Let's have appearances for defendant.

Who is here?

*MR. WOLLY*: Good morning, your Honor. Excuse me. I'm Michael Wolly.

*THE COURT*: Okay. Mr. Wolly.

*MR. ROSS*: Mr. Ross, your Honor.

*THE COURT*: And Mr. Ross.

Mr. Ross, Mr. Wolly, have either of you talked to

Mr. Olsen or to Ms. Brown?

*MR. WOLLY*: No, your Honor, not -- not since last week. I can tell you that at the pretrial conference with Magistrate Coan last week, there was discussion of the fact that this conference was scheduled and Magistrate Coan described to the parties a number of the matters that you likely would cover at this conference.

*THE COURT*: So there was discussion that there would be a trial prep conference.

*MR. WOLLY*: That's my recollection.

A transcript, as I understand it, was -- was -- it was a recorded conference. Whether or not a transcript has been produced, I don't know.

*THE COURT*: Well, apparently plaintiffs' attorney understood that there would be this trial prep, because he filed a status report as the Court's order ordered him to do. I would just simply state that my order setting this hearing on March 5 indicated that short status report should be filed. And there was no reason why Mr. Olsen should have the thought that he shouldn't be here.

However, I am not going to continue this, because I think this matter very clearly could be decided on paper. I've looked at the magistrate judge's recommendation, at the briefs, it the facts and circumstances of the case. Magistrate Judge Coan is very knowledgeable in this area. She is a very fine judge. And in reading her recommendation, it appears to me that the recommendation, indeed, is extremely thorough. It is very thoughtful.

The issue that has to be decided on a motion for summary judgment is whether -- let me

see if I can just state this in a very short manner: Whether the court, in viewing the evidence and drawing inferences in a light most favorable to plaintiffs -- whether plaintiffs have shown that there is a genuine question of material fact that the union's interpretation was patently unreasonable or in bad faith.

I agree with Magistrate Judge Coan that that has not been shown, and I agree that the -- even if I were to decide this on paper, which I certainly could have done, I agree that the claim of plaintiffs, which is concerning the duty of fair representation, is not a claim which is strong enough to go to the jury and should be dismissed.

I also agree that -- and looking at this on paper -- that the other claims should also be dismissed. We have the claim under the LMRDA; and the Court is also satisfied that there is no violation of section 101 of the LMRDA, and that must be shown in order to show a violation of the section which was argued by plaintiff.

So it appears to me that in looking at the recommendations of Magistrate Judge Coan, they are correct, they should be affirmed; and the motion for summary judgment, defendant's motion, should be and will be granted.

The motion to dismiss the LMRDA claim in the second amended complaint should be granted. The second amended complaint should be dismissed with prejudice.

And I just would note for the record that the standard of review is *de novo*. I am satisfied, looking at this carefully, that the recommendation is correct, and that includes the state law claims of breach of contract, of promissory estoppel.

I have indicated that without any argument from the defendant, because I don't want Mr. Olsen, when he looks at this transcript, to think that I've heard one argument and not his. I make this decision that the motion for summary judgment should be granted on the briefing and on the magistrate judge's recommendation.

However, Mr. Wolly or Mr. Ross, if either of you want to make some statement for the record, go ahead.

*MR. WOLLY*: Your Honor, I would simply note that we have filed a brief in opposition to the plaintiff's objections.

*THE COURT*: Which I've read. I've read the objections, I've read your brief in opposition to the objections.

*MR. WOLLY*: And we don't have anything further to bring to the Court's attention in that regard. Thank you.

*THE COURT*: Thank you.

Well, in view of my ruling that the motions for summary judgment should be granted and that the second amended complaint be dismissed and that the -- I'm not going into every detail, but I think it's very clear on the details in the Magistrate Judge's recommendation.

So let me affirm the recommendation. The motion for summary judgment is granted. The motion to dismiss the LMRDA claim is granted. The second amended complaint is dismissed with prejudice, and the trial date will be vacated.

And if Mr. Olsen wishes to have a transcript, he can make arrangements with the court reporter to get a transcript of this hearing.

Anything further for the record?

*MR. ROSS*: Nothing further, your Honor. Thank you.

*THE COURT*: All right. Thank you. And the Court will be in recess.

(Recess at 9:30 a.m.)

* * * * *

**REPORTER'S CERTIFICATE**

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Dated at Denver, Colorado, this 5th day of July, 2001.

Paul A. Zuckerman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 00-Z-683

CARL L. JAMES, *et al.*,

Plaintiffs,

v.

INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Defendant,

**ORDER OF DISMISSAL AND JUDGMENT**

This matter was before the Court on May 17, 2001, for hearing on Objection to the Recommendation Of United States Magistrate Judge, defendant's Motion to Dismiss LMRDA Claim In First Amended Complaint Or In The Alternative For Summary Judgment, and plaintiff's Second Amended Complaint And Jury Demand. There was no appearance made on behalf of plaintiffs. No argument was heard, and the matter was decided on the briefs. The Court made oral conclusions of law which are incorporated herein by reference as if fully set forth.
Accordingly, it is

ORDERED that the Recommendation Of United States Magistrate Judge is affirmed. It is

FURTHER ORDERED that defendant's Motion To Dismiss LMRDA Claim In First Amended Complaint Or In The Alternative For Summary Judgment is granted. It is

FURTHER ORDERED that plaintiffs' Second Amended Complaint And Jury Demand is dismissed with prejudice. It is

FURTHER ORDERED that judgment is entered in favor of defendant and against plaintiffs. It is

FURTHER ORDERED that the Complaint and cause of action are dismissed with prejudice. It is

FURTHER ORDERED that the parties shall bear their own costs. It is

FURTHER ORDERED that the trial date of June 18, 2001, is vacated. It is

FURTHER ORDERED that all pending motions are moot.

DATED at Denver, Colorado, this 17 day of May, 2001.

BY THE COURT:

ZITA L. WEINSHIENK, Senior Judge
United States District Court